CHINBIOMEDIC ENGINEERING SDN BHD A

v.

KLINIK PUVVAN & SURGERY

HIGH COURT MALAYA, JOHOR BAHRU B
VERNON ONG LAM KIAT J
[CIVIL SUIT NO: (MT-1) 22-822-2005]
20 APRIL 2010

CONTRACT: *Breach - Sale of goods - Delivery of wrong goods - Whether goods rejected by purchaser - Whether purchaser obliged to return goods to supplier - Communication of rejection of goods by purchaser to supplier, whether sufficient - Delivery of correct goods - Damages for non-delivery* C

SALE OF GOODS: *Delivery - Delivery of wrong goods - Whether goods rejected by purchaser - Whether purchaser obliged to return goods to supplier - Communication of rejection of goods by purchaser to supplier, whether sufficient - Delivery of correct goods - Damages for non-delivery* D

The defendant had agreed to purchase 12 units of Baxter 1150 Dialysis Machines ('Baxter Machines') from the plaintiff, a supplier of medical equipment. The plaintiff subsequently delivered six units of Fresenius A2008E Dialysis Machines ('Fresenius Machines') to the defendant's premises. The defendant rejected this consignment of Fresenius Machines because they were not in accordance with the contract. The plaintiff then filed the present claim seeking special damages, alleging that the defendant's rejection was in breach of the contract. The defendant counterclaimed, contending that it had treated the contract as repudiated due to the plaintiff's breach of condition and that, consequently, it was entitled to damages for non-delivery and recovery of monies paid to the plaintiff. The principal question to be determined was whether the defendant had accepted delivery of the Fresenius Machines. E F G

Held (dismissing the plaintiff's claim with costs, and allowing the defendant's counterclaim): H

(1) It was for the plaintiff to show that the defendant had accepted delivery of the Fresenius Machines but, on the facts and the totality of the evidence, it was apparent that the defendant had rejected them. It was sufficient in law if the defendant had intimated to the plaintiff that he refused to accept the Fresenius I

Machines; the defendant was under no obligation to return them to the plaintiff. On the evidence, it was clear that verbal rejection of the Fresenius Machines was communicated to the plaintiff's representative. It then fell upon the plaintiff to take back the rejected Fresenius Machines but it did not do so. Furthermore, there was no evidence to show whether the plaintiff had delivered the Baxter Machines to the defendant. The defendant was, thus, entitled to damages for non-delivery. (paras 6 & 7)

[General damages to be assessed by Deputy Registrar.]

Case(s) referred to:
Wadkin Robinson (Malaysia) Sdn Bhd v. Rimber Industries Sdn Bhd [1994] 2 CLJ 577 HC ***(refd)***
Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka [1979] 1 LNS 65 FC ***(refd)***
Legislation referred to:
Contracts Act 1950, s. 40
Evidence Act 1950, ss. 92
Sale of Goods Act 1957, ss. 12, 42, 43, 57

For the plaintiff - S Bala Sekaran; M/s Bala & Co
For the defendant - Lim Hsien Loong; M/s Jal & Lim

Reported by Suresh Nathan

JUDGMENT

Vernon Ong Lam Kiat J:

[1] The plaintiff's claim is for general and special damages arising from the defendant's alleged breach of contract for the supply of dialysis machines sold by the plaintiff to the defendant.

Brief Account Of The Facts

[2] The plaintiff is a supplier of medical supplies and equipment. By a quotation dated 14 March 2005 the defendant agreed to purchase from the plaintiff 12 units of Baxter 1150 Dialysis Machines ('the Baxter Machines') including other equipments for RM323,700 for the setting up of a dialysis centre. On 5 May 2005 the plaintiff delivered six units of Fresenius A2008E dialysis

machines ('the Fresenius Machines') to the defendant's premises. The defendant found that the dialysis machines delivered by the plaintiff were not the Baxter Machines. On 3 June 2005 the defendant followed up with a letter to the plaintiff stating *inter alia* that the plaintiff had agreed to replace the Fresenius Machines with Baxter Machines. The plaintiff did not replace the Fresenius Machines. The defendant has paid a total of RM154,500 to the plaintiff.

Plaintiff's Claim

[3] The plaintiff contends that the defendant knew or ought to have known that the plaintiff procured the supply of the dialysis machines from Medical Devices International Corporation of Saint Louis Missouri U.S.A. The plaintiff entered into a contract with the American suppliers for the supply and purchase of 12 units of dialysis machines. Pursuant thereto the first consignment of six units of the Fresenius Machines were delivered and installed at the defendant's Klinik Dr. Puvvan at Ulu Tiram on 5 May 2005. The defendant accepted delivery of the Fresenius Machines because he was satisfied with the performance and quality of the Fresenius Machines. However, on about 7 August 2005 the defendant rejected the Fresenius Machines on the grounds that the defendant could purchase similar machines at a comparatively cheaper price and requested the plaintiff to accept the return of the Fresenius Machines. The plaintiff did not receive the defendant's purported letter of complaint dated 3 June 2005. The defendant's rejection jeopardised the second consignment of six units of dialysis machines were also ready for shipment from U.S.A. and the plaintiff's commercial dealings with the American supplier. The defendant's rejection of the Fresenius Machines was in breach of the contract between the plaintiff and the defendant. As a consequence of the defendant's breach the plaintiff is claiming for RM82,781.60 in special damages; the claim for general damages has been abandoned.

Defendant's Defence And Counterclaim

[4] Pursuant to the contract between the defendant and the plaintiff as evidenced by the quotation dated 14 March 2005 the defendant ordered and the plaintiff agreed to deliver 12 units of the Baxter Machines. The defendant also ordered other medical equipment which was needed to set up a dialysis centre which included a RO water system and dialysis chairs. The defendant

rejected the first consignment of six units of Fresenius Machines because they were not in accordance with the contract (ss. 42 & 43 Sale of Goods Act 1957; *Wadkin Robinson (Malaysia) Sdn Bhd v. Rimber Industries Sdn Bhd* [1994] 2 CLJ 577). There is no oral agreement to change to order from the Baxter Machines to Fresenius Machines. The plaintiff's evidence contradicting the terms of the contract is inadmissible (s. 92 Evidence Act 1950; *Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka* [1979] 1 LNS 65 FC).

[5] By way of counterclaim the defendant contends that due to the plaintiff's breach of condition the defendant has treated the contract as repudiated (s. 12 Sale of Goods Act 1957; s. 40 Contracts Act 1950). Consequently the defendant is entitled to damages for non-delivery (s. 57 Sale of Goods Act 1957). Further, the defendant is entitled to recover the price paid of RM154,500.

Findings Of The Court

[6] In this suit the principal question to be determined is whether the defendant accepted delivery of the Fresenius Machines. Acceptance is deemed to have taken place when the buyer has intimated to the seller that he has accepted them or when the goods are delivered and he does any act which is inconsistent with the ownership of the seller or retains the goods after a lapse of a reasonable time without intimating to the seller that he has rejected them (s. 42 Sale of Goods Act 1957). It is not disputed that the quotation specified the Baxter Machines. Instead the plaintiff delivered to the defendant the first consignment of Fresenius Machines in breach of the specifications. Dr. Puvanaraja a/l Naidu (DW1) testified that he chose the brand of Baxter Machines after getting good feedback about the performance of the Baxter Machines in India. DW1 also said that when the Fresenius Machines were delivered they were in a dismantled state. When DW1 inspected the Fresenius Machines and found that they were not Baxter Machines and he rejected them immediately. The plaintiff's representative one Chelyan who was also present tried to persuade DW1 to accept the Fresenius Machines but DW1 rejected Chelyan's suggestion. It is pertinent to note that Chelyan was the only person who dealt with DW1 on this transaction. DW1 followed up with an official complaint letter dated 3 June 2005 to the plaintiff addressed to its Kuala Lumpur office; this is consistent

with Chelyan's business card. The plaintiff's contention on this issue is weak and unsubstantiated. Firstly, Chelyan was not called to give evidence to challenge or contradict DW1's evidence. Secondly, the plaintiff's only witness Granasivam a/l Chinaya (PW1) said that even though the plaintiff agreed to supply the Baxter Machines, the plaintiff delivered the Fresenius Machines. PW1 was not present when the Fresenius Machines were delivered; PW1 was not present when DW1 rejected the Fresenius Machines. PW1 did not give any evidence to show that DW1 accepted delivery of the Fresenius Machines. PW1 only said that the plaintiff did not receive DW1's letter. There is also no evidence to justify a finding that there was an oral agreement to change the order from the Baxter Machines to Fresenius Machines. Even if there is, such evidence would be inadmissible under s. 92 of the Evidence Act 1950 *(Pernas Trading, supra)*. In this case it is for the plaintiff to show that the defendant accepted delivery of the Fresenius Machines. There is no delivery order or any other document to show that the defendant accepted delivery of the Fresenius Machines. The plaintiff contended that the defendant accepted the Fresenius Machines because subsequent to delivery they received payment of RM54,750 on 10 May 2005. DW1 explained that this payment was made via a post-dated cheque which he had issued in April 2005 of which RM4,750 was for five dialysis chairs, RM9,500 for automatic reprocessor and RM40,500,00 in part-payment of the Baxter Machines yet to be delivered. Chelyan had also told DW1 that the money was also needed to cover freight charges. On the totality of the evidence DW1's explanation is more plausible. In the premises the court finds that the defendant rejected the Fresenius Machines.

[7] In the circumstances, ought the defendant to have returned the rejected Fresenius Machines to the plaintiff? In law it is sufficient if the defendant has intimated to the plaintiff that he refuses to accept the Fresenius Machines (s. 43 SOGA). The defendant is under no obligation to return the Fresenius Machines to the plaintiff. On the evidence it is clear that DW1 communicated the rejection verbally to Chelyan who was present. It then fell upon the plaintiff to take back the rejected Fresenius Machines but they did not do so. Further there is no evidence to show that the plaintiff has delivered the Baxter Machines to the defendant or at all. In the premises the defendant is entitled to damages for non-delivery (s. 57 SOGA).

[8] For the foregoing reasons the plaintiff's claim is dismissed with costs. The defendant's counterclaim is allowed in prayers (b), (c) general damages to be assessed by the Deputy Registrar, (d) and (e).